Judge Robert S. Lasnik

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. ZACHARY AUGUSTUS SMULSKI, Defendant.	NO. CR16-239RSL **GOVERNMENT'S SENTENCING MEMORANDUM**

I. INTRODUCTION

This case involves an educated and well-compensated chief financial officer who embezzled money and then cooked the books to hide that embezzlement. Defendant Zachary Smulski does not appear before the Court at sentencing to accept full responsibility for his misconduct. Although Mr. Smulski pled guilty to three counts of wire fraud, he now attempts to minimize his fraud by spinning an apocryphal tale in which he is an embattled hero who had to divert money in secrecy *to benefit* his victim. He claims that the diversion caused no harm because he always intended to return the

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diverted funds. This tale is beyond belief. Zachary Smulski is not a hero; he is a thief and a conman. He did not act to benefit his victim; he acted to benefit himself.

Mr. Smulski's apocryphal tale does not stand up to scrutiny. Overwhelming evidence of his own conduct demonstrates that he took concrete steps to use **$631,500** of the diverted funds to support his personal business endeavors and only returned the money when the embezzlement was discovered. After diverting the money, Mr. Smulski quickly comingled the funds and spent approximately $24,000 of the money, he drafted and circulated a business plan indicating that one of his startup companies had raised **$631,500**, and he offered that same amount of money in a financing arrangement with yet another startup company under his control. To hide the diversion, he fabricated documents and subverted the very same internal controls that he was duty-bound to protect as his employer's chief financial officer.

In light of Mr. Smulski's pattern of misconduct and his remarkable refusal to accept full responsibility for his misconduct, the United States respectfully recommends a sentence of 30 months imprisonment, a three-year term of supervised release, and a restitution judgment in the amount of $29,514.70.

II. BACKGROUND

Defendant was employed as Soundpath Health's chief financial officer from approximately September 2008 to April 25, 2012. Plea Agreement ("PA") at ¶7.b. From approximately September 23, 2011 to April 25, 2012, he created and executed a scheme to embezzle $1.8 million from Soundpath, **$631,500** of which he attempted to use to fund a startup company he was developing called Trucaris. PA at ¶7.d-e. In doing so, he violated his fiduciary duty to Soundpath, created fraudulent accountant documents, and made material representations to numerous people. When the scheme was discovered by Soundpath's controller, Mr. Smulski returned the **$631,500** and fled the company in disgrace. As discussed below, the uncontested facts demonstrate that, from the outset,

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Mr. Smulski intended to keep and spend **$631,500** of the diverted funds to support his various startup companies.

A. Zachary Smulski's Personal History

Unlike many defendants who appear before the Court, Zachary Smulski has lived a privileged life. He has a supportive family, received a good middle-class upbringing, and had the privilege of extensive education. Presentence Report ("PSR") at 44. He has strong ties to community. He is married and has three adult children.

Mr. Smulski's financial situation was secure. When he embezzled the money, he was making over $180,000 a year as Soundpath's CFO. Exh. 1. He did not steal money from Soundpath to support a lavish lifestyle. Rather, he stole money because he was dissatisfied with his role at Soundpath and planned to leave the company to run his own startup company.

B. Mr. Smulski Exploited His Position of Trust as Soundpath's CFO

The fraud scheme at issue in this case is particularly egregious because it did not involve arm's-length transactions. Mr. Smulski did not rip-off strangers who should have done their due diligence before agreeing to suspicious business deal. Instead, Mr. Smulski exploited a victim to whom he owed a high duty of care. Indeed, it was precisely because he occupied a position of trust as a CFO that he was able to embezzle so much money in such a brazen fashion.

Mr. Smulski's crimes, therefore, must be viewed in connection with the fiduciary duty he owed to Soundpath as the senior executive with chief responsibility for the financial affairs of the company. PA at 7.b. This duty required Mr. Smulski: (1) to act in the best interest of Soundpath; (2) to put Soundpath's financial welfare and interest above his own personal or other business interests; (3) to disclose conflicts of interest; (4) to disclose all material facts to Soundpath's officers and directors; and (5) to act with honesty, good faith, and fairness when handling Soundpath's obligations. *Id.*

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Mr. Smulski was reminded of his fiduciary duty from the outset of his employment at Soundpath. When he joined Soundpath (then called Puget Sound Health Partners), Mr. Smulski signed an attestation averring, "I have read the PSHP's Standards of Conduct and, to the best of my abilities, will conduct my PSHP activities consistent with these principles and standards." Exh. 2 at 3. In subsequent years, Mr. Smulski signed new attestations forms as Soundpath's code of conduct was updated. During the course of Mr. Smulski's embezzlement scheme, Soundpath's ethical code provided, among other things:

> "We communicate openly and honestly at all times upholding the values of the organization and do not make false or misleading statements."
>
> "We act in the best interest of Soundpath Health and our enrollees at all times"
>
> "We engage in business activity in such a way to avoid any conflict of interest. All potential conflicts are identified in a conflict of interest disclosure statement"
>
> "We use supplies, equipment, and property bought and owned by Soundpath Health for business purposes only unless authorized otherwise by Management. We protect supplies and equipment from loss or abuse to the best of our ability. Unauthorized use of Soundpath Health property is considered theft."

Exh. 4 at 3. Mr. Smulski also received periodic compliance training that included Fraud, Waste, and Abuse Training. PSR at ¶7. For example, on January 31, 2012, Mr. Smulski signed a certification indicating that he had undergone his annual training. Exh. 5.

As Soundpath's CFO, Mr. Smulski regularly reported to the company's board of directors. Mr. Smulski was obligated to provide the board with updates about investments, accounting irregularities, and any other matter that could materially impact the health of the company. PSR at ¶7; *see also* Exh. 6 at ¶5; Exh. 7 at ¶10.

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Highly important to this case, Mr. Smulski had an obligation to follow and promote Soundpath's "internal controls." PSR at ¶7. Internal controls are procedures that are put in place in a company's accounting department to prevent fraud and to otherwise protect the integrity of a company's financial and accounting information. *Id.* Some internal controls are designed to create a record that can be followed during an audit. For example, certain internal controls require that entries made into a company's accounting journals are supported by backup documents, such as invoices, that document transactions that lead to journal entries being made. As Soundpath's CFO, Mr. Smulski was the corporate officer who was supposed to have the highest understanding of the company's internal controls and the correct functioning of the company's accounting processes.

C. As an Experienced Accountant, Mr. Smulski Knew the Diversion of Funds Was Not Only Inconsistent with Generally Accepted Accounting Principles, But Also Highly Illegal

Mr. Smulski's diversion of money from Soundpath to Trucaris cannot be attributed to a novice mistake, an inability to understand contracts, or a misunderstanding of the relevant accounting principles. He has worked in the accounting field for decades and has a deep understanding of the importance of following proper accounting process. Mr. Smulski received his B.S. in Business Administration (Accounting) from City University of Seattle. He was licensed as a Certified Public Accountant (CPA) from March 31, 1989 to June 30, 2015. A CPA credential is a widely recognized and respected badge of a professional accountant. To become a CPA, a person must meet educational and experience requirements and pass an exam to qualify for a state license. In addition to being a CPA, Mr. Smulski obtained an MBA from the University of Washington in 2003. Finally, Mr. Smulski taught accounting courses at local colleges. Among other courses, he taught Introduction to Accounting/Bookkeeping I and Introduction to Business.

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Mr. Smulski used his accounting credentials to obtain employment in accounting departments in a number of health care companies. *See* PSR, ¶¶55-57. For example, he was the manager of Analytics & Reporting at Regence BlueShield from 1990 to 2001, he was vice president at Olympic Health Management Systems from 1992 to 1998, and he was the chief financial officer at Sea Mar Community Health centers from 2001 to 2008.

D. Mr. Smulski's Dissatisfaction with Soundpath's Owners

Despite receiving an annual salary of over $180,000, Mr. Smulski was dissatisfied at Soundpath. *See* Def. Sent. Memo. at 4-5 (criticizing Soundpath's former ownership structure). Two of Mr. Smulski's former co-workers indicated that Mr. Smulski was frustrated with his job and had resentment toward Soundpath's board of directors. Thuy Le, a longtime colleague of Mr. Smulski, indicated that Mr. Smulski told her that he felt that the board had wrongly passed over him for the company's CEO position. Exh. 7 at ¶7. Apparently, Mr. Smulski felt that he should have been selected for the position because he was working harder for the company than the new CEO. *Id.*

Another co-worker, Bob Peters, recalls a conversation where Mr. Smulski expressed "rage" over the board's performance with respect to a possible acquisition by another company. Exh. 8 at 2. Mr. Peters further indicated that Mr. Smulski was angry that the board did not give him and other officers equity in the company and, ironically, stated his opinion that the board viewed Soundpath as its "cash cow." *Id.*

E. Mr. Smulski Dreams of Being the CEO of His Own Company

Although Mr. Smulski had full-time responsibilities as Soundpath's CFO, he was working on the side to develop a startup company called Trucaris that he could run and control when he left Soundpath. Mr. Smulski incorporated Trucaris as a Delaware Corporation in April 2011. PSR at ¶9. He then registered Trucaris with the Washington Secretary of State on October 5, 2011, and identified himself on the registration paperwork as the company's president. *Id.* He also opened a business economy checking

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bank account at Bank of America/Merrill Lynch in the name of Trucaris, Inc. Mr. Smulski identified himself on the application for the account as the chairman of Trucaris and his spouse as the chief financial officer. *Id.*

Mr. Smulski enlisted numerous people to help him develop Trucaris. PSR at ¶9. One person was Dan Solberg, with whom Mr. Smulski had worked in the past. According to Mr. Solberg, Mr. Smulski intended to run Trucaris as the company's CEO after he left Soundpath. Until that time, Mr. Solberg was to serve as the business' nominal CEO. Exh. 10 at ¶4. However, it was understood from the outset that Mr. Smulski would do the hands-on work to develop the company, including incorporating the company and setting up the business' bank accounts. Exh. 9 at ¶6. At Mr. Smulski's request, Mr. Solberg invested approximately $20,000 into the company to offset business costs that Mr. Smulski claimed that he had incurred. *Id.* at ¶11.

F. Mr. Smulski Creates and Executes an Elaborate Scheme to Embezzle Money from Soundpath to Fund Trucaris

According the aprocrypal tale that Mr. Smulski presents in his sentencing memorandum, his diversion of funds from Soundpath to Trucaris "was intended to be, and was, temporary." Def. Memo. at 13. *See also* Def. Letter to Probation at 7 n.3 ("[Defendant] had no intention of retaining the sale leaseback funds"). Mr. Smulski would have the Court believe that he had no intention to use the money he diverted and that he needed to divert the funds to Trucaris to avoid breaching the terms of one the leaseback agreements (hereinafter referred to as "Lease No. 3"). *See* Def. Letter to Probation at 3. As discussed below, this apocryphal tale has no basis in reality, and is fully inconsistent with the concrete steps that Mr. Smulski took to use the money.

1. Mr. Smulski Advises Soundpath to Enter into the Lease Back Agreements and Makes No Mention of Any Problems with Lease No. 3

On June 21, 2011, Mr. Smulski, in his capacity as CFO, submitted a memorandum to Soundpath's management team requesting permission to enter into sale-leaseback

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agreements on behalf of Soundpath. Exh. 11; PA at ¶7.c. Additional financing was needed to increase Soundpath's cash reserves in compliance with legal requirements. *Id.* Mr. Smulski explicitly promised that cash received pursuant to the proposed financing agreements would be invested into safe, "restricted investment grade securities." *Id.* By using this term, Mr. Smulski was referring to securities such as treasury bonds. PA at ¶7.c.

MEMORANDUM

TO: EXECUTIVE-FINANCE COMMITTEE
FROM: ZACHARY SMULSKI, CFO
SUBJECT: CAPITAL LEASE & ASSET FINANCING
DATE: 6/21/2011

Due to financial planning needs, management is requesting authorization to enter into capital leases to finance the cost of existing assets and future system purchases. Capital leases allow insurance company to finance assets while maintaining or improving their equity. Soundpath used capital leases in 2007 to finance $200k of furniture, equipment, and computers (FE&C) during start up. The proposed capital leases will cover current admitted and non-admitted assets, and proposed system implementation costs. Non-admitted assets totaled $2 million as of May 31 and include FE&C, advances to brokers for 2011 new enrollment, pharmacy rebates, and prepaid expenses. Under the lease, the financing company would pay Soundpath cash for non-admitted assets, and we would make monthly payments to the bank finance company over 5 years. The cash received needs to be invested into restricted investment grade securities.

Notably, Mr. Smulski did not make any mention of money going to Trucaris or any other company. Nor did he advise Soundpath's management -- as he asserts now to the Court -- that Soundpath was prohibited from immediately receiving all of the proceeds from the leaseback sales.

On September 15, 2011, Mr. Smulski submitted a memorandum to Soundpath's board of directors recommending that the Board pass a corporate resolution that authorized him to enter into the sale-leaseback agreement with Marquette. Exh. 12 at 1.

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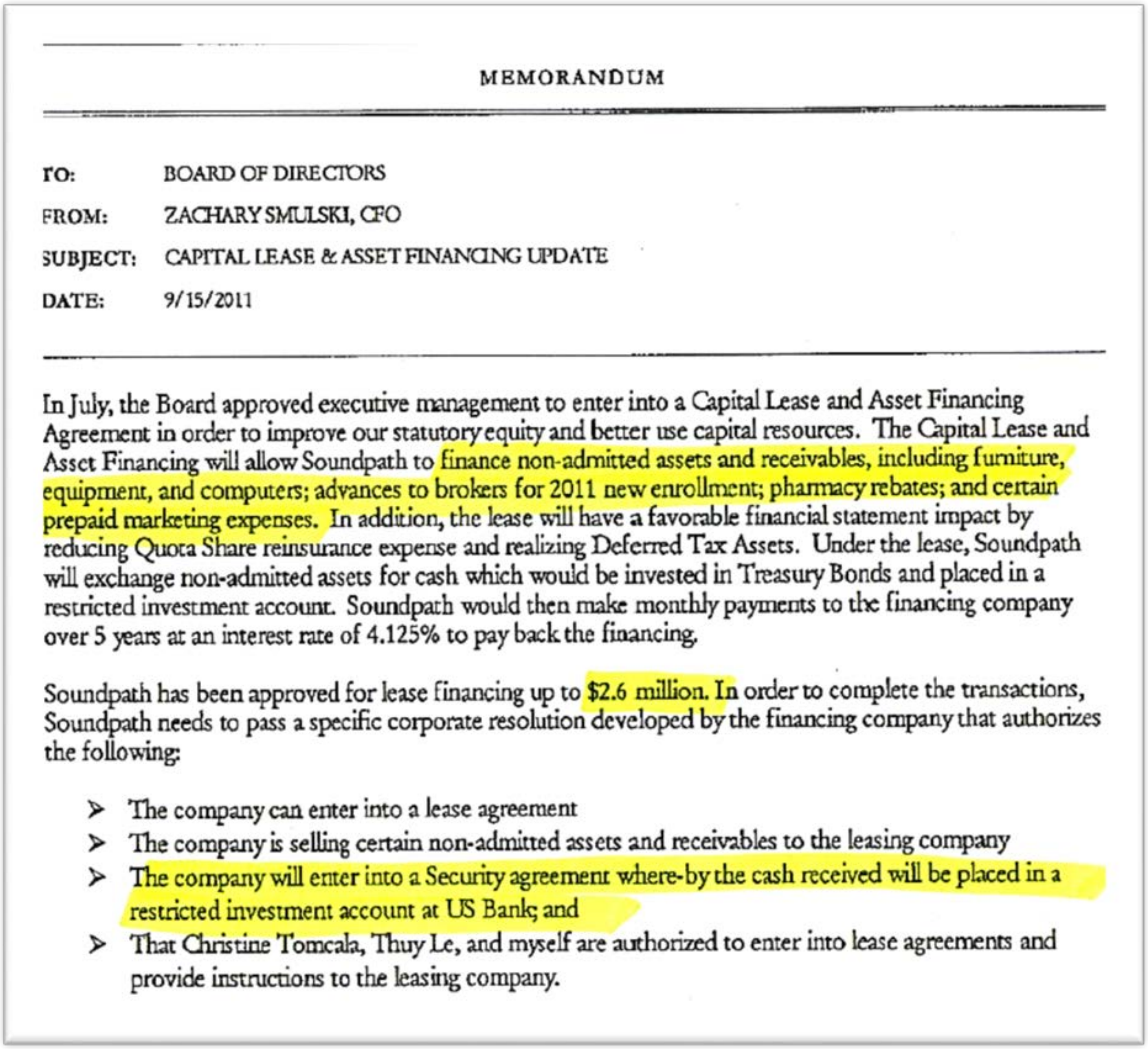
In the memorandum, ZACHARY SMULSKI represented that funds received from Marquette would "be placed in a restricted investment account at US Bank." *Id.*



MEMORANDUM

TO: BOARD OF DIRECTORS
FROM: ZACHARY SMULSKI, CFO
SUBJECT: CAPITAL LEASE & ASSET FINANCING UPDATE
DATE: 9/15/2011

In July, the Board approved executive management to enter into a Capital Lease and Asset Financing Agreement in order to improve our statutory equity and better use capital resources. The Capital Lease and Asset Financing will allow Soundpath to finance non-admitted assets and receivables, including furniture, equipment, and computers; advances to brokers for 2011 new enrollment; pharmacy rebates; and certain prepaid marketing expenses. In addition, the lease will have a favorable financial statement impact by reducing Quota Share reinsurance expense and realizing Deferred Tax Assets. Under the lease, Soundpath will exchange non-admitted assets for cash which would be invested in Treasury Bonds and placed in a restricted investment account. Soundpath would then make monthly payments to the financing company over 5 years at an interest rate of 4.125% to pay back the financing.

Soundpath has been approved for lease financing up to $2.6 million. In order to complete the transactions, Soundpath needs to pass a specific corporate resolution developed by the financing company that authorizes the following:

- The company can enter into a lease agreement
- The company is selling certain non-admitted assets and receivables to the leasing company
- The company will enter into a Security agreement where-by the cash received will be placed in a restricted investment account at US Bank; and
- That Christine Tomcala, Thuy Le, and myself are authorized to enter into lease agreements and provide instructions to the leasing company.

Again, Mr. Smulski made no mention of a need for a third party -- such as Trucaris -- to take custody of any of the money received from the leaseback sales. Exh. 12 at 1. To the contrary, Mr. Smulski unequivocally indicated that the money will be "placed in a restricted investment account at US Bank," thereby creating the impression that the money would solely be used to purchase collateral. *Id.*

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Based on Mr. Smulski's representations, the board authorized Mr. Smulski to enter into the leaseback agreements. Subsequently, Mr. Smulski -- in his capacity as CFO of Soundpath -- entered into four sale-leaseback arrangements with Marquette. Each leaseback agreement dealt with a different category of asset, "including furniture, equipment and computers, advances to brokers for 2011 new enrollment. . . and certain prepaid marketing expenses." Exh. 12 at 1. The terms of the leaseback agreements made clear that: (1) Soundpath would sell assets to Marquette in return for cash, and (2) Soundpath would make lease payments to Marquette to continue using the assets. At issue in this case is Lease No. 3, which dealt with prepaid broker commissions.

2. Lease No. 3 Prohibited Exactly What Mr. Smulski Now Claims He Was Required to Do

Without citing any actual language from the leaseback agreements, Mr. Smulski contends that "[u]nder the terms of Lease No. 3, Soundpath was not entitled to receive the funds that temporarily remained in the Trucaris bank account until such time as Soundpath had prepaid commission balances that could be purchased by Marquette using the funds held by Trucaris." Def. Sent. Memo. at 8. Not surprisingly, this contention is completely unsupported by the contractual language. There was nothing about the contract that required the money received from Lease No. 3 to go to Trucaris or any other third party. In fact, the leaseback contracts explicitly prohibited what Mr. Smulski claims was now required by Lease No. 3. Ex. 13. Namely, all the leaseback contracts were governed by the following provision from the master lease agreement, which Mr. Smulski himself executed: "[SOUNDPATH] MAY NOT ASSIGN ANY LEASE OR ANY OF ITS RIGHTS HEREUNDER OR SUBLEASE THE PROPERTY WITHOUT THE PRIOR WRITTEN CONSENT OF [MARQUETTE]." *Id.* at 8.

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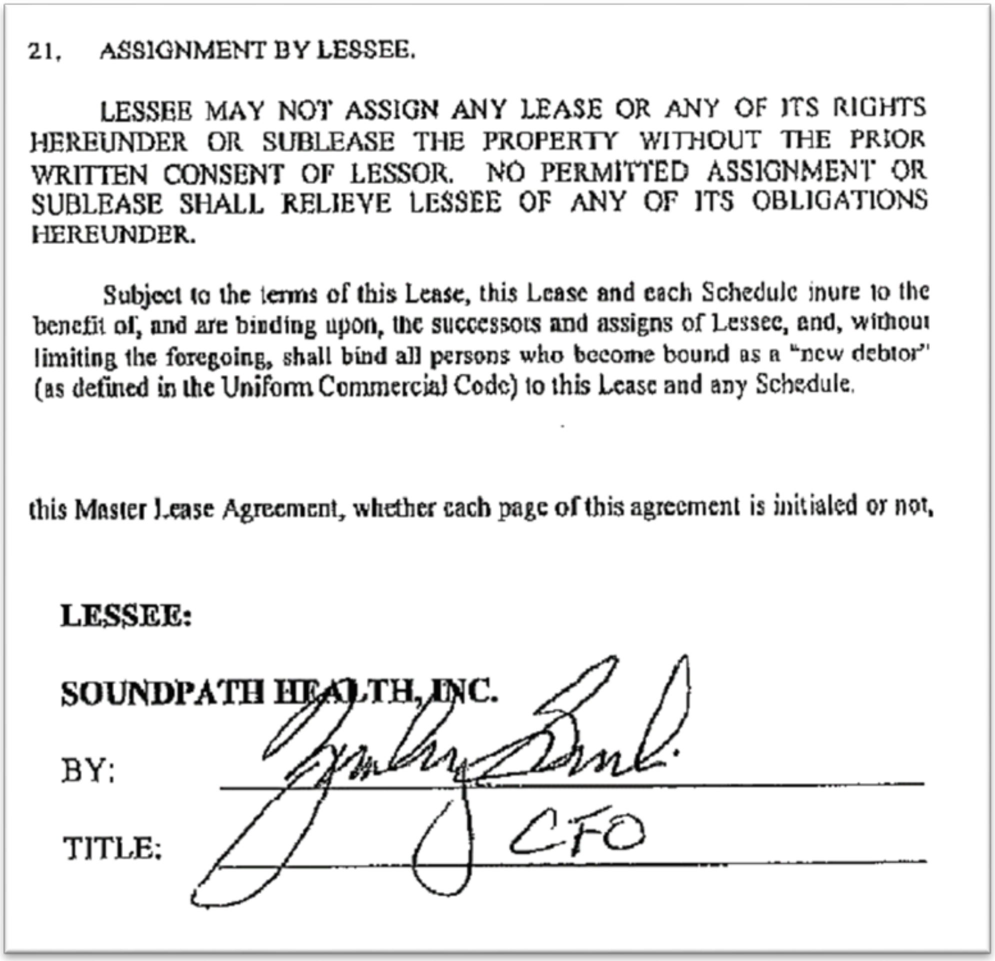

21. ASSIGNMENT BY LESSEE.

LESSEE MAY NOT ASSIGN ANY LEASE OR ANY OF ITS RIGHTS HEREUNDER OR SUBLEASE THE PROPERTY WITHOUT THE PRIOR WRITTEN CONSENT OF LESSOR. NO PERMITTED ASSIGNMENT OR SUBLEASE SHALL RELIEVE LESSEE OF ANY OF ITS OBLIGATIONS HEREUNDER.

Subject to the terms of this Lease, this Lease and each Schedule inure to the benefit of, and are binding upon, the successors and assigns of Lessee, and, without limiting the foregoing, shall bind all persons who become bound as a "new debtor" (as defined in the Uniform Commercial Code) to this Lease and any Schedule.

this Master Lease Agreement, whether each page of this agreement is initialed or not,

LESSEE:

SOUNDPATH HEALTH, INC.

BY:

TITLE: CFO

3. Mr. Smulski Tricks Marquette into Sending Money to Trucaris

In September of 2011, Mr. Smulski made arraignments for Marquette to start transferring money under the leaseback agreements. He took elaborate steps to ensure that Marquette would not realize that certain transfers would be made to Trucaris instead of Soundpath.

On September 16, 2011, Mr. Smulski filled out and executed an authorization form that directed Marquette to send money to a Soundpath "operating account" held at Bank of America. Exh. 15. Mr. Smulski signed the authorization form as the CFO of Soundpath and gave no indication that the account belonged to Trucaris. *Id.* To reinforce the illusion that the account was a Soundpath account, on September 22, 2011,

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Mr. Smulski sent an email from his Soundpath email account to Marquette regarding the account. Exh. 16. In the email, he lied, "I had my staff double check with the bank and the bank account is set up to accept ACHs [(e.g., Automated Clearing House transfers)]." *Id.* In truth, no "staff" at Soundpath knew about the account or checked to see if it could receive the transfer. PSR at ¶11.

On September 23, 2011, based on the defendant's misrepresentations and instructions, Marquette transferred a total of $1,705,524.09 to the Trucaris account. On November 1, 2011, Marquette transferred an additional $155,055.34 to the Trucaris account at the defendant's direction. However, to Mr. Smulski's surprise, Marquette started debiting the Trucaris account for the lease payments that Soundpath owed Marquette. Namely, on October 6, 2011, Marquette debited the account for $108,952.46. Exh. 17 at 2.

To prevent Marquette from drawing down the Trucaris account further, on November 21, 2011, Mr. Smulski sent an email to Marquette with a new authorization form that directed Marquette to make future transfers to a different bank account. Exh. 18. Mr. Smulski wrote, "I have attached a payment transfer form for completing this and request that all future transfer/payments be tied to our investment account. An ACH would be preferable, but if timing becomes tight, we will clear for a wire transfer." *Id*. The attached transfer authorization form correctly indicated that the new account was a Soundpath "investment" account held at U.S. Bank. *Id.*

In response to the sudden change, Cathy Lawrence asked Mr. Smulski to clarify his instructions. Exh. 19 at 1. Mr. Smulski provided the following nonsensical explanation for the change:

> We have been working on matching our investment cash inflows with our investment cash outflows, including lease expense. After reviewing our existing set-up, we have concluded that we would like to change the ACH and now have all of our lease payments come out of the US Bank Investment Account.

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Id. That same day, the defendant transferred $24,140.51 from the Trucaris account to Transtar Financial, a separate startup company that was under the control of Smulski and his wife. In doing so, Mr. Smulski demonstrated that he fully intended to use that money for personal purposes without Soundpath's knowledge or consent. PSR at ¶12. Although Mr. Smulski represented to Marquette that Soundpath had "been working on matching our investment cash inflows with our investment cash outflows" and that Soundpath had "review[ed] our existing set-up," nobody at Soundpath was aware that Mr. Smulski had diverted money to the Trucaris account at Bank of America.

Mr. Smulski did use a portion of the money in the Trucaris account on behalf of Soundpath to cover the company's expenses. And, he transferred approximately $1,120,126.96 from the Trucaris account to Soundpath. However, Mr. Smulski retained control over **$631,500** of the money received from Marquette until he was caught by Soundpath's controller, Thuy Le.

4. Mr. Smulski Conceals the Diversion of Funds from the Board of Directors and Conceals His Conflict of Interest

Mr. Smulski had a fiduciary obligation to apprise Soundpath's board of directors of any significant investment activity and about any conflicts of interests he had. However, Mr. Smulski never informed the board that the Marquette money was going to his startup company (Trucaris). Nor did he disclose that $24,140.51 of the Marquette money went to another one of his companies (Transtar) after it passed through the Trucaris account. Mr. Smulski did not make the disclosure because he knew that the board would not approve of this diversion of the Marquette money and of the obvious conflict of interests that were created by passing the money through two separate companies that were under Mr. Smulski's control.

5. Mr. Smulski Used Fake Invoices to Cook the Books

Mr. Smulski used fraudulent documents to cover up his diversion of funds to the Trucaris account. PSR at ¶13. One such document was an invoice that purported to

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show that Soundpath had paid a company called "The Physicians Trust" a premium payment of $391,832.69 and owed the company an additional estimated payment of $30,039. Exh. 20. The top of the invoice indicates that The Physicians Trust is "Administered by HSLI (Health Services London Life Insurance)." *Id.* "The Physicians Trust" is an actual insurance company based out of Louisiana. Exh. 21. However, it has never done business with Soundpath or its predecessor company, Puget Sound Health Partners. *Id.* Moreover, The Physicians Trust is not administered by "Health Services London Life Insurance," *id.*; it is administered by HSLI which is a subsidiary of the Louisiana Hospital Association, *see* https://lhatrustfunds.com/about-us/, last checked June 23, 2017.

Several aspects of this fake document are highlighted below:

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003

THE PHYSICIANS TRUST

Coverage with Confidence

Administered by HSLI (Health Services London Life Insurance)

Provider Trust Reinsurance
Claims Report

The correct acronym for this fake company should be HSLLI, not HSLI.

Puget Sound Health Partners
32129 Weyerhaeuser Way S., Suite 3021
~~Federal Way, WA 98001~~
Attn: Zachery Smulski

Smulski indicates that his own fake invoice was sent to his attention.

Corridor Risk Coverage

Claims Reimbursement

Reported Claim No						Total	EOP Code
P00670501	POD5	346,939	250,000	125,000	(12,500)	112,500	
P0001649901	POD5	207,403	207,803	82,803	(8,280)	74,523	
P0001450801	POD6	167,194	167,194	42,194	(4,219)	37,975	
P0001172301	POD5	162,870	162,870	37,870	(3,787)	34,083	
P0000670301	POD6	143,996	143,996	18,996	(1,900)	17,096	
P0001065901	POD6	135,402	135,402	10,402	(1,040)	9,362	
Total Claims Report		1,164,204	1,067,265	317,2[illegible]			

Smulski indicates Soundpath owes the fake company $421,872.

Swing Plan Premium

Estimated Annual Premium	421,872
Premium payments made	(391,833)

Estimated Additional Premium Payment Due	
Estimated Premium overpayment refund	
Approved Claims for Payment (MLR 67.7%)	285,539
Interim Payment to Insured as of 10/31/2011	255,50[illegible]

Smulski signs and dates the fake invoice.

We should be receiving a wire transfer for this amount shortly

11/4/2011

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By creating and submitting this fake invoice to Soundpath, Mr. Smulski knowingly violated Soundpath's internal controls. He deliberately used this invoice as a backup document to support improper journal entries for transactions that never occurred. PSR at ¶13. Furthermore, Mr. Smulski could use this fake invoice to indicate that over $400,000 of the money from Lease No. 3 needed to be paid to a fictional third-party instead of being directed to Soundpath.

6. Mr. Smulski Took Concrete Steps to Use the $631,500

Mr. Smulski concedes that he used approximately $24,140 of the money he embezzled. *See* Def. Sent. Memo. at 13. However, he adamantly asserts that he intended to return *all* of the money. Mr. Smulski's broad denial does not -- and cannot -- meaningfully address the overwhelming evidence that shows that he took concrete steps to use the **$631,500**.

The evidence shows that Mr. Smulski attempted to use the money in at least three different ways. First, as defendant concedes, Mr. Smulski comingles the diverted money with funds in the Trucaris account, and quickly spent $24,140 of the comingled funds to support his startup endeavors. *See* Def. Sent. Memo. at 13 ("The $24,140 transfer reimbursed Transtar for funds it had contributed towards attorneys' fees and other costs associated with the incorporation of Trucaris, and the $12,000 check partially reimbursed Smulski for funds he had contributed to Transtar."). Notably, Mr. Smulski has no explanation for why *any* of the leaseback money was permitted to cover the costs of Trucaris or Transtar.

Second, the defendant used the retained funds to create that appearance that one of his startup companies was successfully raising money. He drafted a draft business plan for a company called "Foundation Health" that indicated that the company was owned by a consortium of healthcare business partners including Marquette and Transtar, and that the company was "using the offices of one of its investors to support accounting, corporate affairs, market development, and host business planning meetings." Exh. 22.

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Id. at 2 and 4-5. Notably, the business plan further indicated that Foundation Health had raised exactly **$631,500** in advanced funding:

Stages of Development

Foundation Health is at the pre-funding stage, however it is on track be close to breakeven financially in 2011 & 2012. The company is using the offices of one of its investors to support accounting, corporate affairs, market development, and host business planning meetings.

Q1-11 Formation of Foundation Health
Development of provider marketing material, discussion with insurers and reinsurers

Q2-11 Meetings with provider groups and investors gateways to test business concept
Secure Broker and Reinsurance Agreement for 2011
Identify "Early Adopter" physicians & medical group supporters

Q3-11 Raised $631,500 in Advanced Funding

Q4-11 Secure Reinsurance Agreement for 2012
Project 2011 to be breakeven

Id. at 5. Not surprisingly, Mr. Smulski never disclosed to Soundpath that Foundation Health was using Soundpath's resources, or that Soundpath had provided $631,500 in advance funding to the company. Nor did he inform Marquette that it was an investor in the company. Mr. Smulski provided the Foundation Health Business plan to Thuy Le in an effort to get her to come work with him at the company. Mr. Smulski even went as far as to put together a consulting contract for Ms. Le to come work with him in developing the company. PSR, ¶14. [1]

Third, Mr. Smulski took substantial steps to allow Trucaris to spend the money. On November 11, 2011, Smulski proposed to Trucaris' board of directors that it enter

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[1] It is unclear whether Foundation Health was an earlier name for Trucaris or whether Mr. Smulski intended it to be a separate business. It is clear, however, that Mr. Smulski was serious about developing the company into a business he could run when he left Soundpath.
In addition, it is important to note the Ms. Le had no indication that Trucaris or Foundation Health was illegally funded until she later discovered the embezzlement.

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into a financing agreement to receive exactly **$631,500** in exchange for 1 million shares of Trucaris stock. Exh. 23 at 1; Exh. 9 at ¶8; Exh. 10 at ¶4. According to Mr. Smulski, the company that would be providing the money was Marquette Venture (or as phonetically in the board minutes, "Market Ventures"). *See* Exh. 23 at 2. Although the board voted to enter into the agreement, the agreement was never finalized.

The following is an excerpt from the Trucaris Board Meeting Minutes that memorializes Mr. Smulski's attempt to use the $631,500 to fund Trucaris:

TRUCARIS

Board Meeting Minutes

Date: 11/11/2011
Location: West Seattle Office Space
In Attendance: Zachary Smulski, Daniel Solberg, Alejandra Monroy, & Russell Solberg
Not In Attendance: N/A

The board meeting was called to order by the Chairman Zachary Smulski at 9:40 AM with all board members in attendance.

After a discussion on the bylaws surrounding the notice requirements of a board meeting, Daniel Solberg made a motion that board waves all notice requirements within the bylaws. Ale Monroy seconded the motion and it passed unanimously after being put to a vote.

The second item the board's agenda related to the funding agreement for $631,500 between Trucaris and Market Venture. The board reviewed the terms and the conditions of the agreement and discussed the various insurance requirements. Daniel Solberg made a motion that the board accepts the actions taken by the chairman in the execution of the Market Venture funding agreement. The motion was seconded by Ale Monroy and passed unanimously after being put to a vote.

As part of the Market Venture funding agreement, Daniel Solberg made a motion that the board approves the transfer of 1,000,000 shares of stock from Puget Sound Health Partners to Market Venture. Russell Solberg seconded the motion and it passed unanimously after being put to a vote.

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G. Mr. Smulski Panics and Flees Soundpath When Thuy Le Discovers the Embezzlement Scheme

In early 2012, officials from the Washington State Office of Insurance Commissioner began an audit of Soundpath. During the audit, Soundpath's controller, Thuy Le, noticed that accounting records related to the sale-leaseback arrangement with Marquette were missing. Ex. 7 at ¶21. When Ms. Le asked Mr. Smulski if he had the files, he lied and said that he did not. *Id.* The following day, he placed the files into Ms. Le's office. *Id.*; PSR at ¶16. When Ms. Le confronted him about the magical reappearance of the files, Mr. Smulski apologized to Ms. Le and indicated that he had forgotten that he had them. *Id.*

Ms. Le suspected that the defendant was committing fraud. Ex. 25 at 3. She then went to Soundpath's compliance officer, to advise her that the company was missing documents related to the leaseback arrangements including backup documents for certain journal entries. *Id*. Mr. Smulski observed Ms. Le talking to the compliance officer and requested to speak with Ms. Le. *Id.* When Ms. Le met with the Mr. Smulski, he told her that he was sorry that he had took the sale-leaseback journal entries. *Id.*; PSR at ¶16.

Over the next two days, Mr. Smulski went and got a cashier's check drawn on the Trucaris account in the amount of $631,500 and *personally* deposited the check into Soundpath's bank account. This was an unusual event because it was a violation of Soundpath's internal controls for the CFO to personally deposit a check. PSR at ¶17.

When Ms. Le questioned the defendant about the source of the deposit, he lied and said that the check had arrived by FedEx from Soundpath's "trust account." Exh. 25 at 3. Ms. Le observed that Mr. Smulski was nervous and sweating. *Id.* He told Ms. Le that he had forgotten about the money and would get her the backup documents for the deposit later. *Id.* Ms. Le expressed her disbelief that the defendant could have forgotten a transaction involving such a large amount of money. Exh. 7 at ¶23. In response, the

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defendant ended the meeting and indicated that he was not feeling well and would tell her more later. *Id.*

Mr. Smulski repeatedly lied to Ms. Le to cover up the embezzlement. He knew that Trucaris was not a "trust account," particularly when he had attempted to use that exact same amount of money to fund Trucaris. Furthermore, he knew he did not receive the money from FedEx because *he had personally* gone to Bank of America to withdraw the money from Trucaris' bank accounts.

After the encounter with Ms. Le, Mr. Smulski stopped showing up for work. Although he had some limited email correspondence with Soundpath employees, he stopped performing his duties as Soundpath's CFO without explanation. When Auditors from the OIC and Soundpath's CEO attempted to meet with Mr. Smulski to discuss the deposit of the $631,500, he refused to meet with them. Exh. 6 at ¶8.

H. Mr. Smulski's Betrayal Put Soundpath in Jeopardy

Mr. Smulski's use of his position as CFO of Soundpath to embezzle money was devastating to Soundpath. Soundpath has submitted a victim impact statement that candidly and eloquently details the harm that Mr. Smulski caused. *See* PSR at ¶¶19-23. Among other things, Mr. Smulski's embezzlement jeopardized Soundpath's fiscal solvency, compromised its reputation with the Office of Insurance Commissioner, and caused great emotional harm to the employees who trusted and relied on him.

After Mr. Smulski fled the company, Soundpath was left in the disadvantageous position of having to unravel his complex fraud scheme. It comes as no surprise that Soundpath's controller and finance department employees "were unable to substantiate transactions he initiated for several months" considering Mr. Smulski's use of fake invoices, the convoluted manner in which he structured transactions and journal entries, and his adamant refusal to meet to discuss the diversion of funds. Mr. Smulski's breach of his fiduciary duty was particularly hard on co-workers who had worked with him for

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many years and who looked up to him as a leader and a mentor. Mr. Smulski continues to betray their loyalty by casting aspersions on their credibility and competence. *See, e.g.*, Def. Sent. Memo. at 17 (questioning the controller's credibility and the compliance officer's competence).

I. Mr. Smulski Lies to His New Employer

After he left Soundpath, Mr. Smulski publicly acted as if the fraud had never occurred. In an amazing act of self-delusion, he even pretended that he had never worked at Soundpath. In October of 2015, Mr. Smulski applied for a corporate officer position at a health center in Idaho. During his application process, Mr. Smulski concealed the fact that he had worked at Soundpath and had left the company facing embezzlement accusations. For example, Mr. Smulski's resume indicated that from September 2008 to August 2015, he was employed only at Zale Professional Group. *See* Exh. 24 at 1-2. In the resume, he *completely omits* that he worked at Soundpath from 2008 to 2012. Mr. Smulski knew that if he had listed his employment as the CFO of Soundpath, there was a significant chance that the health center would have contacted Soundpath and learned about Mr. Smulski's embezzlement and unethical business practices. Not knowing of Mr. Smulski's prior history, the health center hired Mr. Smulski and employed him as the company's CFO until the U.S. Attorney's office informed the company of Mr. Smulski's indictment.

III. THE PRESENTENCE REPORT AND THE APPLICABLE SENTENCING GUIDELINES CALCULATION

Mr. Smulski does not object to any specific facts contained in the PSR. However, Mr. Smulski strenuously objects to the Probation Office's application of those facts to the Sentencing Guidelines provision dealing with the loss amount enhancement. In summary, Mr. Smulski contends that the loss amount for Guidelines purposes should be *zero* because he had "no intention of retaining the sale leaseback funds." Def. Letter at 7

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n. 3. Despite the evidence to the contrary, Mr. Smulski would have the Court believe that he was not going to retain the **$631,500** he diverted to Trucaris. Mr. Smulski's objection completely lacks evidentiary support and raises serious questions about whether he should receive any points for acceptance of responsibility under the Guidelines analysis.

A. The PSR Correctly Applies a 14-Level Loss Enhancement Because Mr. Smulski Returned the Money Only After He Was Caught

Application Note 3(E)(i) to USSG § 2B1.1 indicates that the loss amount in a wire fraud case shall be reduced by money returned to the victim "before the offense was detected." As explained by the note, "[t]he time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or government agency."

The PSR correctly applies this provision to calculate a loss amount of $631,500 and a corresponding 14-level enhancement pursuant to USSG § 2B1.1(b)(1)(H). It is uncontested that Mr. Smulski diverted over $1.8 million of the Marquette leaseback money to Trucaris. The PSR correctly credits Mr. Smulski for funds which he sent to Soundpath before April 1 or which he used to cover Soundpath's final obligations before the fraud was discovered.

As discussed above, in April of 2012, Ms. Le uncovered Mr. Smulski's embezzlement of the money. PSR at ¶16. After his initial interaction with Ms. Le about the missing funds, he "knew or reasonably should have known that the offense was detected or about to be detected by [Soundpath] or a government agency." USSG § 2B1.1(E)(i). Indeed, it was only *after* Ms. Le confronted Mr. Smulski that he took steps to have the remaining funds (**$631,500**) transferred from Trucaris to Soundpath. *Id.* Accordingly, the **$631,500** serves as an appropriate measure of the loss amount for Guidelines purposes.

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There is overwhelming evidence that -- but for Ms. Le detecting the fraud -- Mr. Smulski would have continued to use the **$631,500**. Namely, Mr. Smulski circulated a business plan showing that his startup company had raised exactly that amount of money. Furthermore, he formally proposed to Trucaris' board of directors that the startup company accept that exact same amount of money in return for stock. These facts establish by a preponderance of the evidence that Mr. Smulski always intended to retain the **$631,500** and only returned the money after he knew or reasonably should have known the embezzlement had been detected.

B. Mr. Smulski's Apocryphal Explanation for the Diversion Lacks Merit

1. The Leaseback Agreements Prohibited the Assignment of Funds to Trucaris

Mr. Smulski claims that "[u]nder the terms of Lease No. 3, Soundpath was not entitled to receive the funds that temporarily remained in the Trucaris bank account until such time as Soundpath had prepaid commission balances that could be purchased by Marquette using the funds held by Trucaris." Def. Letter at 3. This claim is pure fiction; it is a desperate and egregious attempt by a fraudster to shirk responsibility for his misconduct.

There was nothing about the contract that required the money received from Lease No. 3 to go to Trucaris or any other third party. In fact, the leaseback contracts explicitly prohibited what Mr. Smulski claims was required by Lease No. 3. As explained above, Lease No. 3 was governed by a strict non-assignment clause that stated: "[SOUNDPATH] MAY NOT ASSIGN ANY LEASE OR ANY OF ITS RIGHTS HEREUNDER OR SUBLEASE THE PROPERTY WITHOUT THE PRIOR WRITTEN CONSENT OF [MARQUETTE]." *See supra* Section II.F.2. In other words, Soundpath needed Marquette's explicit approval before assigning leaseback funds to a third-party like Trucaris.

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Mr. Smulski's awkward response to this contractual language is telling. He attempts to obfuscate his violation of the non-assignment clause with nonsensical accounting language wrapped around a blatant lie. He contends, "[a]lthough the leases contained a clause stating that Soundpath could not assign the leases without Marquette's consent, Smulski *believed* that the assignment of the leases to a third party would be agreed to by Marquette because it was critical to achieving the capital surplus advantages associated with the sale leaseback arrangements." Def. Sent. Memo. at 16 (emphasis in the original).[2]

Mr. Smulski *did not believe* Marquette would approve of the transfer to Trucaris. In fact, he went to great lengths to hide from Marquette that he was diverting money to a non-Soundpath account because he knew the diversion was illegitimate. As discussed above in section II.F.3, *supra*, Mr. Smulski tricked Marquette into believing that the leasebacks funds would be going to a Soundpath account. He portrayed the account as a Trucaris investment account and created the appearance that the account had been set up

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[2] Despite his elaborate ruse to hide the diversion from Marquette, Mr. Smulski speculates that Marquette would have approved the assignment because Marquette later consented to an assignment of the leases to CollabHalth Plan Services, Inc. There are several ironic aspects to Mr. Smulski's reference to this assignment. First, the assignment to CollabHealth Plan was done the *right way* after full disclosure to Marquette and after negotiating a written contract that memorialized Marquette consent to the assignment. This stands in stark contrast to Mr. Smulski's unilateral and surreptitious decision to assign the funds to Trucaris. Second, the assignment to CollabHealth Plan was not done to "achiev[e] . . . capital surplus advantages"; it was done because Soundpath had been acquired by Catholic Health Initiatives (CHI) and placed with its subsidiary CollabHealth along with a portfolio of other Medicare Advantage health insurance plan providers. *See* http://www.catholichealthinitiatives.org/documents_public/News%20Releases/2014-07-15_Prominence%20Health%20release.pdf, last checked June 23, 2017. Simply put, the assignment to CollabHealth bears no resemblance to Mr. Smulski's diversion of funds to Trucaris.

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and vetted by Soundpath employees. These are not the actions of a man who has nothing to hide.

Nor was the assignment designed to achieve "capital surplus advantages", whatever that means. There is no conceivable way that diverting money to a non-Soundpath account was advantageous to Soundpath. Using that money to inflate the value of one of Mr. Smulski's startup plans, and offering to invest the money into another startup company was advantageous only to Zachary Smulski. Indeed, Mr. Smulski's embezzlement of such a large amount of the money threatened Soundpath's financial solvency. *See supra* Sect. II.H.

2. No Accounting Principle Justifies the Diversion of Funds

At various points, Mr. Smulski implies that there was an accounting justification for his diversion of funds to Trucaris. However, Mr. Smulski fails to identify any accounting rule under GAAP or the statutory rules that apply to insurance companies that would prohibit Soundpath from taking custody of *all* of the money under the leaseback arrangement. There simply is no accounting or tax reason why Soundpath would have had to place the leaseback funds in the custody of a third party.

Mr. Smulski strangely states that, "[t]he excess $631,500 would have been booked as an asset, but an offsetting loan would have been recorded, resulting in no net benefit to Soundpath." Def. Sent. Memo. at 16. This fictitious and untimely accounting argument runs contrary to the very purpose of the leaseback arrangements -- to sell assets to Marquette in return for cash to increase Soundpath's capital reserves. Soundpath sold an asset to Marquette under Lease No. 3, and was entitled to custody of proceeds of that sale. It simply makes no sense that Soundpath would have the ability to sell an asset but not be able take custody of the proceeds of that sale.

Mr. Smulski's attempt to present an accounting justification for his misconduct raises a host of questions. If there was an accounting problem with Lease No. 3, why did Mr. Smulski unequivocally recommend to Soundpath's board that the company enter into

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the agreement in the first place? Similarly, if Lease No. 3 required special treatment, why didn't Mr. Smulski just explain the situation to Thuy Le or someone else at Soundpath? Why didn't he alert Marquette to the problem when he was negotiating the lease? Why did he so flagrantly breach Soundpath's code of conduct? Why did he act in such secrecy and refuse to meet with the OIC auditors and Soundpath's management? Mr. Smulski has no reasonable answers to these questions, yet he continues to tell his apocryphal tale that he diverted the funds for Soundpath's benefit. It adds insult to injury that -- after all the harm he has caused -- Mr. Smulski would pretend that he diverted the money out of a principled concern that Soundpath was violating some accounting principle that he cannot even identify with any degree of specificity. The only principle that guided Zachary Smulski's diversion of the money was personal greed.

3. Mr. Smulski's Apocryphal Tale Is Contradicted by His Efforts to Use the Money

One cannot help but be taken aback by the stunning audacity of Mr. Smulski's dogged advancement of his apocryphal story that the diversion was actually a principled treatment of Lease No. 3, when the evidence unequivocally shows that he intended to use the **$631,500**. As explained in Section II.F.6, *infra*, Mr. Smulski took concrete steps to use the money. Namely, he spent approximately $24K of comingled funds from the Trucaris account to cover Transtar's costs, he claimed that Foundation Health had raised exactly **$631,500**, and he proposed to Trucaris' board of directors that the company accept **$631,500** in financing. Again, Mr. Smulski does not -- and cannot -- rebut this evidence showing he intended to use all the money.

4. There Is No Place in Mr. Smulski's Apocryphal Tale for His Fabrication of Documents and Causation of Improper Journal Entries

Mr. Smulski contends that he couldn't have intended to keep the $631,500 because -- as a CPA and experienced CFO -- he knew Soundpath's books would be audited. Def. Letter at 5. This contention is completely undermined by the fact that Mr. Smulski created fake documents to cover up the diversion, and he likely would have fabricated

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additional documents if Thuy Le had not discovered the fraud. *See supra* Section II.F.5. Mr. Smulski does not even mention, much less address, the fake Physicians' Trust invoice and the fraudulent journal entries he caused. Indeed, how could he continue to portray himself as the hero of his tale while acknowledging the irrefutable evidence that he cooked the books to hide his embezzlement?

C. Given Mr. Smulski's Continued Deceit About His Misconduct, He Is Not Entitled to Credit for Acceptance of Responsibility

Mr. Smulski has stipulated to sufficient facts in the plea agreement to support his plea to the crime of wire fraud. However, "[a] defendant who enters a guilty plea is not entitled to an adjustment under [under the Guidelines] as a matter of right," particularly when the plea agreement contains no stipulation from the government that the defendant has accepted responsibility for Guidelines purposes. USSG § 3E1.1, Application Note 3. Mr. Smulski's apocryphal tale contradicts the core facts of this case and falsely denies "additional relevant conduct for which the defendant is accountable under § 1B1.3." USSG § 3E1.1, Application Note 1(A). The fact that Mr. Smulski would so audaciously attempt to whitewash his misconduct at this late date raises severe concerns about his risk of recidivism.[3]

Arguably, whether or not Section 3E1.1(a) applies is moot because all the parties are recommending a below-Guidelines sentence. However, the United States submits that the application of this provision has great pragmatic and symbolic importance. It is a humbling experience for a defendant to accept full responsibility for this misconduct in open court. Accepting responsibility is an important step for the defendant to learn from

[3] The letter submitted by Mr. Smulski's sister suggests that he told her the same apocryphal story that he tells in his objection letter. Contrary to what he told his sister, Mr. Smulski did not "mishandle" funds. He violated his fiduciary duty to Soundpath, stole $631,500 with the intention of spending the money, and he took elaborate steps to hide his theft.

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past mistakes. Accepting responsibility is also an important step for victims to gain closure and to move on from the harms they have suffered.

Mr. Smulski is not willing to humble himself. He is not willing to learn from his past mistakes. And, most importantly, perhaps, he is not willing to give Soundpath and his former colleagues the apology they deserve. This remarkable refusal to accept responsibility should not be condoned or credited in any fashion.

D. The Government's Proposed Guidelines Calculation

In light of the above arguments, the United States offers the following calculation under the advisory Sentencing Guidelines:

Base Offense Level (2B1.1(a)(1))	7
Loss More than $550,00 (2B1.1(b)(1)(H))	+14
Abuse of Position of Trust	+2
Total	**23**
	46-57 months

IV. SENTENCING FACTORS

The Section 3343(a) sentencing factors support the imposition of a 30-month jail sentence. The most pertinent factors are discussed below.

A. Nature and Circumstances of the Offense

Corporate officers, like Zachary Smulski, are entrusted with great responsibility. Where, as here, a corporate officer exploits his position of trust and breaches his fiduciary duty, a particularly egregious crime has occurred. Indeed, Mr. Smulski should be held to a higher standard than an ordinary fraud defendant precisely because he violated his fiduciary duty. Mr. Smulski was the corporate officer at Soundpath who was supposed to have the highest and best approach to the company's internal controls and accounting

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processes. However, rather than supporting these controls and processes, he subverted them.

Driven by greed and a false sense of entitlement, Mr. Smulski brazenly stole **$631,500** from Soundpath and only returned the money was he knew he was caught. His embezzlement involved fraudulent documents; lies and material omissions to Soundpath, Marquette, and Trucaris' board of directors; and convoluted transfers of stolen money. The embezzlement was not a simple, singular event -- rather, it was a calculated and sophisticated scheme.

Mr. Smulski's embezzlement tarnished Soundpath's reputation and jeopardized the operation of the company. He caused great emotional stress to his former colleagues and caused Soundpath to spend substantial time and resources to remediate the fraud. Unfortunately, the magnitude of Mr. Smulski's crime has been amplified by his apocryphal and audacious sentencing arguments. Rather than present evidence of mitigation, he has cast aspersions against the former colleagues who he betrayed. Rather than accept responsibility, he has attempted to portray himself as an embattled hero seeking to benefit his victim. It seems that everyone but Zachary Smulski understands that he was caught red-handed and that there is no reasonable way to explain away his misconduct.

Soundpath is in the best position to assess the harm that Mr. Smulski suffered. The company requests that the Court "sentence Mr. Smulski to the maximum recommended or allowed prison sentence." In accordance with this request, the United States requests that the Court sentence Mr. Smulski to 30 months which is maximum sentence that the government is allowed to recommend under the plea agreement.

B. History and Characteristics of the Defendant

Mr. Smulski's history and characteristics contain both mitigating and aggravating factors. Until the instant offences, Mr. Smulski had no criminal history and appeared to

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be a productive member of society. He has a supportive family and positive ties to the community. To his credit, Mr. Smulski has performed well on pre-trial release and has agreed to make restitution to Soundpath for costs related to its investigation of his fraud.

However, unlike many defendants who appear before the Court, Mr. Smulski did not have a difficult upbringing or a lack of family support. At the time of the offense, he was earning over $180,000 a year. He had amassed the education and experience to allow for a comfortable life. Despite all of these advantages, he chose to steal **$631,500** from his employer. Mr. Smulski's conduct during the fraud scheme reveals a man who -- despite living a life of privilege -- was driven to embezzle money to satisfy his ambition of being the CEO of his own startup company.

Mr. Smulski's subsequent concealment of his troubled history from his next employer and adamant refusal today to accept full responsibility for his misconduct, evinces an astounding lack of personal growth from his encounter with the criminal justice system. Mr. Smulski's reticent, five-sentence apology letter to the Court -- combined with his apocryphal and audacious sentencing arguments -- suggest that Mr. Smulski is not sorry for what he did; he is just sorry he got caught. This remarkable failure to accept full responsibility indicates that Mr. Smulski poses a risk of recidivism because one cannot learn from one's mistakes until one accepts responsibility for those mistakes.

As with every criminal defendant, there are clearly positives about Mr. Smulski's life and his accomplishments. In this case, however, it is difficult to balance these positives against the enormity of his misconduct and his refusal to accept full responsibility for that misconduct. Consequently, a lengthy term of imprisonment is appropriate.

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C. The Need for the Sentence to Reflect the Seriousness of the Offense, to Promote Respect for the Law, and to Provide Just Punishment

These factors weigh strongly in favor of a judgment that imposes a lengthy term of incarceration. As always, there is a crucial need to promote respect for the laws and to provide just punishment in light of the seriousness of the offense. Wire fraud is a serious crime that carries a statutory maximum term of imprisonment of 20 years. The seriousness of this crime is enhanced when, as here, the fraud scheme stretches across multiple years, involves a large sum of money, and is predicated on the breach of a fiduciary duty.

The defense's recommendation of a term of probation is inapposite to these sentencing factors. Zachary Smulski ran roughshod over the confidence and trust that Soundpath placed in him. A probation sentence would not adequately vindicate the harm that Soundpath suffered. Nor would a probation sentence reflect the seriousness of a CFO breaching his fiduciary duty, violating internal controls, and submitting fraudulent accounting documents to conceal his embezzlement.

D. The Need to Afford Adequate Deterrence and the Need to Protect the Public from Future Crimes of the Defendant

Mr. Smulski's refusal to accept full responsibility indicates that a harsh sentence should be imposed because nothing else would seem adequate to impress on him the gravity of the crimes he committed. Mr. Smulski will pose a risk of recidivism until he acknowledges the undeniable fact that he diverted **$631,500** with the specific goal of using that money to develop his startup companies. It is troubling that Mr. Smulski would deny this fact when his own business plan for Foundation Health said he had raised that exact sum of money and he successfully convinced Trucaris' board of directs to accept that exact sum of money in a financing deal.

A harsh sentence is also needed to send a strong message of deterrence to corporate officers who occupy fiduciary positions. Companies and their stake-holders

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place elevated trusts in their officers. However, there is an ever-present risk that such officers may violate their duties to line their own pockets. Corporate officers should not be left with the impression that they will be able to explain away their misconduct with blank denials, specious accounting arguments, and apocryphal tales. Instead, they should know that they will be held to a high standard commensurate with their fiduciary duty. Accordingly, a lengthy jail sentence is needed in this case to serve as a countervailing deterrent to misconduct by other corporate officers.

E. The Need to Avoid Unwarranted Sentencing Disparity

In fashioning a sentence, the Court must consider the "need to avoid unwarranted sentence disparities" among "defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). A 30-month sentence falls squarely within the range of sentences imposed in other embezzlement cases in recent years. *See, e.g.*, *United States v. Thomas*, CR13-0564 (president of credit union sentenced to 18 months for fraud scheme resulting in approximately $126K loss to credit union); *United States v. Bormann-Zweekhorst*, CR13-00099 (manager of water district sentenced to 27 months for attempt to embezzle approximately $350K); *United States v. Yeakel*, CR13-00007 (travel agent sentenced to 24 months for defrauding clients and employer of approximately $339K); *United States v. Caingat*, CR12-5281 (controller of hotel group sentenced to 24 months for diverting approximately $700K), *United States v. Manos*, CR12-5091 (treasurer sentenced to 33 months embezzlement of $112K from police fund); *United States v. Randall Morrison*, CR11-00281 (treasurer of non-profit sentenced to 30 months for embezzling approximately $112K); *United States v. Kelly*, CR10-05755 (office manager of credit union sentenced to 33 months for embezzling approximately $440K and for fabricating documents when confronted by the embezzlement); *United States v. Frantz*, CR10-05431 (recidivist CIO sentenced to 71 months for embezzling approximately $514K).

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These cases establish a range of sentences from 18 months to 71 months. A sentence of 30 months positions Mr. Smulski appropriately in this range given the high amount of money he diverted and his high fiduciary position as Soundpath's CFO. A lower sentence would create a disparity with the *Yeakel* defendant who was merely a travel agent and who embezzled a much smaller amount. A higher sentence would also create a disparity in that it would not appropriately account for the fact that Mr. Smulski returned the money after he was caught and has proactively taken steps to make restitution.

V. RESTITUTION

Mr. Smulski stipulates that he owes the full amount of restitution requested by Soundpath. Defense counsel has proactively taken steps to ensure that the payment will be made immediately after sentencing.

VI. APPELLATE WAIVER

Paragraph 13 of the Plea Agreement contains a waiver of appellate rights in the event that the Court imposes a custodial sentence that is within or below the Sentencing Guidelines range as calculated by the Court.

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VII. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court impose a sentence of 30 months imprisonment, a three-year term of supervised release, and a restitution judgment in the amount of $29,514.70.

Dated this 23rd day of June, 2017.

Respectfully submitted,

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Exhibit	Description
1.	Soundpath Health Supplemental Compensation Exhibit
2.	PHSHP Standards of Conduct Attestation Form dated 9/8/2008
3.	PSHP Standards of Conduct
4.	Soundpath Health 15.3 Standards of Conduct Policy, dated 8/2009
5.	Soundpath Compliance, HIPAA, FWA Training Attestation dated 1/31/2012
6.	Christine Tomcala Interview on 8/31/2016
7.	Thuy Le Interview on 6/2/2016
8.	Robert Peters Interview on 3/13/2017
9.	Daniel Solberg Interview on 9/27/2016
10.	Russell Solberg Interview on 9/27/2016
11.	6/21/2011 Memorandum from Zachary Smulski to Executive-Finance Committee
12.	9/15/2011 Memorandum from Zachary Smulski to Board of Directors
13.	Master Lease Agreement
14.	Wayne Jensen Interview on 5/12/2014
15.	9/16/2011 Authorization Form
16.	9/22/2011 Email from Smulski to Lawrence and Jensen
17.	October 2011 B of A Statement for Trucaris
18.	11/21/2011 Email from Smulski to Jensen and Lawrence
19.	11/21/2011 Email chain between Cathy Lawrence and Zachary Smulski
20.	Fake Physicians Trust Invoice
21.	Physicians Trust Interview on 1/9/17
22.	Foundation Health Business Plan
23.	Trucaris Board of Meeting Minutes
24.	Zac Smulski Resume
25.	Thuy Le interview on 8/2/2012

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s).

/s/ Kylie Noble
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